IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 77-1240

ADIBA MAHROOM,

Petitioner,

vs.

COLONEL JOHN HOOK Commandant, Defense Language Institute, West Coast Branch, an agency of the U. S. Government; HOWARD B. CALLOWAY, Secretary of the United States Army,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The above-named petitioner respectfully prays that a writ of certiorari issue to review a portion of the decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 4, 1977.

OPINION BELOW

The opinion of the Court of Appeals is reported at 563 F2d 1369. Said opinion is attached hereto as Exhibit "A".

JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit was made and entered on November 4, 1977, in Case No. 75-2885. A timely petition for rehearing was denied on December 5, 1977, and petition for certiorari was filed within 90 days of that date. 28 USC §1254 confers on this Court jurisdiction to review the judgment in question by certiorari.

Petitioner seeks a writ of certiorari to review that portion of the judgment of the Court of Appeals which affirmed in part the decision of the District Court. Said judgment affirmed in part and reversed and remanded in part the judgment of the U. S. District Court for the Northern District of California, Honorable LLOYD H. BURKE, Judge, in Case No. C-73-2295-LHB which dismissed plaintiff's (petitioner herein) complaint brought under the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 USC §§2000(e) et seq.

QUESTIONS PRESENTED FOR REVIEW

1. When does the 30 day period to file a federal action begin to run in a Title VII suit against a federal agency in which the complainant never receives a "right to sue" letter?

2. Is the 30 day period embodied in 42 USC §2000e-16(c) absolute in the sense that it would prohibit the application of the doctrine of estoppel to extend the period to file suit, regardless of failure of notice?

3. Was the rule of administrative res judicata properly applied to bar consideration of petitioner's claim of sex discrimination?

STATUTES AND REGULATIONS INVOLVED

The statute involved is Title VII of the Civil Rights Act of 1964, as amended, 42 USC §§2000(e) et seq. The Civil Service regulations involved are 5 CFR §§713.215, 713.234, 713.282. The text of these statutes and regulations is appended hereto as Exhibit "B".

STATEMENT OF FACTS

Petitioner, ADIBA MAHROOM, is a female naturalized citizen of Iraqi descent, the wife of an Arabic language instructor at the Defense Language Institute, West Coast Branch (DLI). She is an experienced teacher having advanced degrees in education and, during two temporary teaching positions at the DLI, had established her status as a competent instructor in the esteem of her supervisor. Few women have held permanent instructor's positions in the DLI's Arabic Department. In 1961, petitioner was informed that she could not obtain a permanent teaching position due to her marital status and the resulting application of the DLI's anti-nepotism policy which prohibited the employment of close family members on the teaching staff (all of whom were men) if as qualified non-related applicants could be found.

In 1971, the DLI announced that it was seeking to employ permanent instructors

assigned to the Arabic Department and, although Ms. Mahroom applied for one of the positions, she was neither interviewed nor selected.

On October 28, 1971 petitioner filed a formal Equal Employment Opportunity (EEO) complaint of discrimination based upon sex and national origin with the Department of Army. Petitioner was not represented by legal counsel as the attorneys she consulted refused to undertake representation. After an administrative hearing was held, the Hearings Examiner concluded that petitioner had not been a victim of discrimination. The findings of the Hearing Examiner which were accepted and adopted by the Department of Army failed to consider whether the anti-nepotism policy which purported to be neutral on its face, operated "to 'freeze' the status quo of prior discriminatory employment practices", prohibited by Griggs v. Duke Power Co. (1971) 401 U. S. 424 at 430, 28 LEd.2d 158, 91 S. Ct. 849. Rather, the Hearing Examiner concluded that "(t)he complainant's allegation that she was not selected because she is the wife of an instructor in the Arabic Department does not strictly come within the purview of this complaint procedure". The Hearing Examiner went on to recite the language of the anti-nepotism policy but omitted to decide whether the policy was discriminatory in application.

After appeal of the final decision of the Department of Army to the Board of Appeals and Review of the Civil Service Commission (BAR) on March 22, 1973, the BAR notified petitioner of the final agency action affirming the Army's decisions. However,

the BAR did not sent petitioner a "Right to Sue" letter informing her of her right to initiate a civil action in federal court within 30 days.

Following receipt of the BAR decision, petitioner contacted several legal services programs seeking help or advice on the prosecution of her claim. One of the agencies contacted informed her that she had lost her opportunity to file a civil suit by reason of the expiration of the 30 day period which began running upon receipt of notice of final agency action. Upon receiving this information, petitioner wrote to the BAR and asked why she had not been notified of her right to sue and requested an extension of time to file suit. On July 5, 1973, the Civil Service Commission (CSC) responded, stating that under its interpretation, the Equal Employment Opportunity Act of 1972 (amending 42 USC §2000e-16 to allow federal employees to file court actions) was not retroactive, did not apply to alleged acts of discrimination occurring prior to March 24, 1972, and that she therefore had no right to bring a civil suit. The letter stated in part:

> "It is our interpretation that notification of the right to file a civil action under the provisions of the Equal Employment Opportunity Act of 1972 arises only when the alleged act or acts of discrimination occurred on or after March 24, 1972, the date the Act became effective. Because your complaint was filed on October 28, 1971, notice of a right to file a civil action was not included in the Board's decision in your case."

Exhibit 1, P. 87. This letter was signed by William P. Berzak, Chairman, Board of Appeals & Review for the Civil Service Commission.

Petitioner, still unrepresented, believed and accepted the representations of the CSC that she did not have the right to file suit and abandoned her efforts to obtain review in federal court.

In 1973, another teaching position in the Arabic Department at the DLI was available, petitioner applied for the position and, again, was not selected. In response, petitioner filed a second complaint alleging discrimination based on sex and national origin on July 27, 1973.

On August 6, 1973, by letter, the Equal Employment Opportunity Officer for the DLI rejected the complaint on the grounds that administrative res judicata embodied in 5 CFR §713.215 barred the suit because it set forth identical matters contained in the previous complaint. The letter also informed petitioner of her right to file suit within 30 days or, alternatively, to appeal to the BAR within 15 days. Petitioner chose to appeal to the BAR, which affirmed the agency decision and sent notice of final agency action and notice of right to sue. In this letter, the BAR stated in part:

> "Civil Service Commission Regulations provide that the Board's decision is final and that there is no further right of administrative appeal. However, if the complainant is not satisfied with this decision, she is authorized by section 717 (c) of the

> Civil Rights Act of 1964 as amended on March 24, 1972 to file a civil action in an appropriate U. S. District Court within thirty (30) calendar days of her receipt of this decision. (Emphasis added) Exhibit 1, p. 4.

This letter was signed by William P. Berzak, Chairman, Board of Appeals & Review for the Civil Service Commission.

Within this thirty day period after receipt of the BAR's letter, petitioner for the first time, obtained the services of an attorney who timely filed suit on her 1973 complaint in the United States District Court for the Northern District of California on December 20, 1973. Said complaint invoked the jurisdiction of the court pursuant to 28 USC §1343 and 42 USC §§2000e, et seq.

On April 24, 1975, respondents moved to dismiss or for summary judgment. Because Petitioner had substituted counsel on May 29, 1975, the hearing was postponed. On June 23, 1975, in addition to a memorandum in opposition to respondents' motion, petitioner filed a motion for leave to amend the complaint to add a cause of action based on the 1971 administrative proceedings. Petitioner contended that she was entitled to amend her complaint because 1) the Equal Employment Opportunity Act of 1972 should be applied retroactively to the time of enactment; 2) the doctrine of equitable estoppel extended the time to file suit because the misrepresentations of the CSC had precluded petitioner from asserting her rights; and 3) since she had never received a "right to sue" letter

on her 1971 EEO complaint, the 30 day period to file suit had never begun running and, thus, her request to amend was timely. Additionally, petitioner contended that her 1973 EEO complaint raised new issues, that her claim of sex discrimination vis-a-vis the DLI's anti-nepotism policy had never been decided and that the doctrine of administrative res judicata was improperly applied.

On August 1, 1975, the motions of petitioner and respondents were heard. The respondents' motion for summary judgment was granted and petitioner's motion to amend was denied.

Petitioner appealed to the Court of Appeals for the Ninth Circuit and raised the same issues argued in the lower court. On November 4, 1977, the Court of Appeals issued its decision holding that the issue of retroactivity of the Equal Employment Opportunity Act of 1972 had been resolved by this Court in petitioner's favor. The Court of Appeals found that the 30 day period to file suit on petitioner's 1971 EEO complaint commenced running at the time that petitioner received the "right to sue" letter from the BAR on her second, 1973 complaint. The Court held that since this 30 day period expired on December 21, 1973, petitioner's request to amend was untimely and jurisdictionally barred. The Court of Appeals failed to discuss the issues of estoppel and administrative res judicata but remanded the case to the District Court for further consideration of petitioner's 1973 EEO complaint. Thereafter, petitioner petitioned the Court for rehearing which was denied on December 5, 1977.

ARGUMENT

1. THE TYPE OF NOTICE SUFFICIENT TO START TIME RUNNING ON CIVIL ACTIONS UNDER TITLE VII SHOULD BE UNIFORM.

Federal courts have been faced with the recurring problem of when the 90 or 30 day period to file a civil suit under 42 USC §2000e-5 or 42 USC §2000e-16, respectively, begins to run and have arrived at conflicting decisions on this issue. In suits against federal agencies, the Ninth, Third and District of Columbia Circuit Courts of Appeals have held that the "right to sue" letter initiates the 30 day period.1/ But the Fifth Circuit has departed from this line of cases and has held that the 30 day period begins to run upon receipt of notice of final agency action.2/

In suits against private employees, the federal courts in the various circuits also have taken divergent positions. Some state that the 90 day period to file suit begins to run from receipt of the

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1/ Mahroom v. Hook (9th Cir. 1977) 563 F2d 1369; Coles v. Penney (D.C. Cir. 1976) 531 F2d 609; Allen v. U. S. (3rd Cir. 1976) 542 F2d 176.

2/ Eastland v. T.V.A. (5th Cir. 1977) 553 F2d 364.

"right to sue" letter3/; others hold that the 90 day period commences upon notice of final agency action4/; while still others find that the notice of failure of concilliation activates the period5/.

In the present case, the Ninth Circuit determined that a type of constructive notice will initiate the 30 day period, which is incompatible with the spirit of the law6/.

3/ Garner v. E.I. Du Pont De Nemours & Co. (4th Cir. 1976) 538 F2d 611; McGuire v. Aluminum Co. of America (7th Cir. 1976) 542 F2d 43; Williams v. Southern Union Gas Co. (10th Cir. 1976) 529 F2d 483;

4/ Page v. U. S. Industries, Inc. (5th Cir. 1977) 556 F2d 346; Key v. Lumberjack Meats, Inc. (D.C. Ala. 1977) 434 F. Supp. 289; Dematteis v. Eastman Kodak Co. (2nd Cir. 1975) 511 F2d 306; Lacy v. Chrysler Corp. (8th Cir. 1976) 533 F2d 353.

5/ Mungen v. Choctaw, Inc. (D.C. Tenn. 1975) 402 F Supp. 1349; Clark v. Morgan's Austintown Foods (D.C. Ohio 1975) 405 F Supp. 1008; Contra: Tuft v. McDonnel Douglas Corp. (8th Cir. 1975) 517 F2d 1301.

6/ Bell v. Brown (D.C. Cir. 1977) 557 F2d 849, 857 stated "We cannot believe that Congress willed the subversion of Sec. 717(c) (42 USC §2000e-5(c)) by an incompatible invocation of imputed notice".

It is manifestly unjust to expect that a "right to sue" letter which by its terms is solely directed to a 1973 EEO complaint, will notify a layperson complainant of her rights in regards to a 1971 EEO complaint. This is especially true when the complainant has been told previously by the CSC that she had no right to bring a civil suit on her 1971 complaint.

This Court has never squarely faced the issues presented by this Writ. Thus, this proceeding presents the Court with the opportunity to settle the issue and bring uniformity to this area of the law.

2. THE COURT OF APPEAL'S IMPLICIT RULING UPON THE ISSUE OF ESTOPPEL IS CONTRARY TO GLUS V. BROOKLYN EASTERN DISTRICT TERMINAL AND OTHER COURTS OF APPEALS DECISIONS.

The Ninth Circuit's decision in the instant case did not rule on petitioner's argument that equitable principles should be applied to extend the period to file suit on her 1971 EEO complaint. Thus, it must be inferred that the Court found petitioner's contentions to be without merit. This supposition finds strong support from a prior decision of the Ninth Circuit, Cleveland v. Douglas Aircraft

Co. (9th Cir. 1975) 509 F2d 1027. 7/ Other Courts of Appeals are not in sympathy with this position and have refused to visit the sins of the EEOC upon the layman initiating the complaint. 8/ The Ninth Circuit has stated that the 30 day period to file suit is "jurisdictional" 9/ and while the meaning of this term is not entirely clear, it suggests that the 30 day period is more than a statute of limitations. If so, is the 30 day period an integral part of a civil suit under Title VII which occasions the extinction of the cause of action upon the expiration of the statutory period? If the answer is yes, this interpretation excludes the operation of the doctrine of estoppel.

This Court has never decided this

7/ In Cleveland v. Douglas Aircraft Co., supra, the plaintiff dismissed a civil suit timely initiated after receipt of a "right to sue" letter at the suggestion of the EEOC and upon EEOC's assurances that a dismissal would not prejudice his right to re-file at a later time. Plaintiff's second civil suit was held untimely and the Court stated that the plaintiff's reliance upon the representations of the EEOC was unjustified.

8/ See: Zambuto v. AT&T (5th Cir. 1977) 544 F2d 1333; De Matteis v. Eastman Kodak Co. (2nd Cir. 1975) 520 F2d 409.

9/ Wong v. The Bon Marche (9th Cir. 1975) 508 F2d 1249.

important question of federal law[10] and this case presents the situation in which the petitioner has been prevented from asserting her rights because of the misrepresentations of the CSC. The government should not be allowed to gain an advantage by reason of its own errors and thereby deprive petitioner of her "day in court". Furthermore, the decision of the Ninth Circuit cannot be reconciled with Glus v. Brooklyn Eastern District Terminal (1959) 359 U. S. 231, 3 LEd. 2d 770, 79 S Ct. 760. [11]

10/ In Electrical Workers v. Robbins & Myers, Inc. (1976) U. S. , 50 LEd. 2d 427, 97 S Ct. , the complainant contended that equitable principles could toll the statutory periods embodied in Title VII but this Court found the argument inconsistent with the facts.

11/ In Glus, the employer contended that estoppel could not be employed to toll the 3 year period to file suit under the Federal Employers' Liability Act because "the time limitation is an integral part of a new cause of action and that cause is irretrievably lost at the end of the statutory period". 359 U. S. at 232. This Court dismissed the employer's contentions and found nothing in the Act or in its legislative history "to indicate that this principle of law (estoppel), older than the country itself, was not to apply in suits arising under the statute". 359 U. S. at 234.

The rationale of Glus, supra, must apply with equal force to the case presented herein. The language of the Civil Rights Act of 1964, as amended, indicates a Congressional desire for speedy resolution of employment discrimination claims but not to the exclusion of equitable principles. Since Title VII actions are ladened with heavy overtones of public interest and such actions are equitable in nature, such actions must be governed by equitable considerations.[12]

3. THE EFFECT OF THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA AS IT APPLIES TO ANTI-NEPOTISM REGULATIONS IS OF SUCH PERVASIVE IMPORTANCE THAT IT SHOULD BE EXAMINED AND CLARIFIED BY THIS COURT.

This Court has held in various decisions that where regulations, neutral and fair on their face, nonetheless have the effect of perpetuating prohibited discrimination such regulations cannot stand.[13] The legally supported anti-nepotism policy, having a legitimate object and purpose, has run head on with the policy that women shall have job opportunities equal to men. Because of the vastly greater number of male incumbents in the prestigious and highly remunerative employment positions, the

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12/ See: McQueen v. EMC Plastic Co. (D.C. Tex. 1969) 302 F Supp. 881.

13/ See: Griggs v. Duke Power Co. (1971) 401 U. S. 424 .

chances of women obtaining such positions are diminished. For example, assuming that there are 50 married couples and that the husband in each case is a qualified instructor on the staff of the DLI, the anti-nepotism policy would prohibit the employment of 50 women who might be as well or better qualified than their spouses. While it might be true that an anti-nepotism policy would be fair if there were 25 men and 25 women incumbents, in practice it is highly discriminatory where all incumbents are male, as here.

It can be expected that this question will be raised repeatedly in a variety of situations and since the aplication given in this case is directly counter to the essense of the law stated in Griggs, a clear affirmation of the right of equal opportunity is of vital and urgent necessity.

CONCLUSION

Depending upon the circuit in which the Title VII complainant is located, the 30 or 90 day period to file a civil suit will begin upon receipt of notice of:

1. failure of concilliation; or
2. final agency action; or
3. right to sue.

Further, the availability of estoppel to toll this period is contingent upon the particular federal circuit in which the complaint is filed. Immediate clarification of the law is compelled by its present state of disarray. It is especially appropriate that this case become the

vehicle for Supreme Court resolution of these issues since the Court of Appeals has determined that further proceedings are required on petitioner's action in any event.

Respectfully submitted,

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EXHIBIT "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADIBA MAHROOM, Appellant, vs. COLONEL JOHN HOOK Commandant, Defense Language Institute, West Coast Branch, an agency of the U. S. Government; HOWARD B. CALLOWAY, Secretary of the United States Army Appellees.	No. 75-2885 O P I N I O N

[November 4, 1977]

Appeal from the United States District Court for the Northern District of California

Before: CARTER, WATERMAN,* and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge:

*The Honorable Sterry R. Waterman, Senior Circuit Judge, United States Court of Appeals, Second Circuit, sitting by designation.

Appellant, Adiba Mahroom, an applicant for federal employment, brought suit against the commandant of the Defense Language Institute (DLI) at Monterey, California, and the Secretary of the Army, principally under Title VII of the Equal Employment Opportunity Act of 1972 [42 U.S.C. § 2000e-16(C)], for employment discrimination upon the basis of sex and national origin.[1] In her complaint, she demanded a declaratory judgment, injunctive relief concerning such alleged discrimination, damages (including lost wages), costs of suit, and attorneys' fees. After providing counsel an opportunity to be heard, the district court denied appellant's motion for leave to amend her complaint and granted appellees' motion for summary judgment, dismissing the action. We affirm the denial of the motion for leave to amend, but we reverse and remand the grant of summary judgment.

BACKGROUND

The 1971 Complaint

Mahroom, a female naturalized citizen of Iraqi descent, has twice been employed at the DLI in temporary positions as a training instructor in Arabic. She has received advanced degrees in education and was considered to be a good teacher by her supervisor at DLI.

In 1971, the DLI announced that teaching positions were open in the Arabic Department, and instructors were to be selected from highly-qualified applicants with Egyptian, Syrian

or Iraqi background, in that order.[2] Mahroom applied for one of the positions; however, she did not obtain an interview or a position. As she failed to obtain employment, she filed a formal complaint on October 28, 1971, alleging discrimination based upon sex and national origin.

After an unsuccessful attempt at an informal resolution of her grievance, the complaint was forwarded to the U. S. Army Civilian Appellate Review Office. An investigator was assigned to undertake a detailed investigation of the facts. After carefully exploring the matter, the inspector reported that student demand justified establishment of selection preferences for persons proficient in the Egyptian and Syrian dialects, and recommended, therefore, a finding of no discrimination. On December 29, 1971, the recommendation was approved by the Civilian Personnel Office.

Subsequently, Mahroom requested a hearing before an Appeals Examiner assigned to the agency by the Civil Service Commission (CSC), and a hearing was conducted on March 14-15, 1972. On June 7, 1972, the Appeals Examiner issued his report, concluding that appellant had not been the victim of discrimination.

On October 27, 1972, the Army's Director of Equal Employment Opportunity (EEO) accepted the finding of no discrimination. This, the final decision, was appealed to CSC's Board of Appeals and Review (BAR). On March 22, 1973, the

BAR affirmed the agency decision. However, the BAR did not send Mahroom a "Right-to-Sue" letter.[3]

Appellant thereafter sought help from the ACLU and from the San Francisco Lawyer's Committee for Urban Affairs.[4] The ACLU advised her that she had 90 days after the BAR's decision was issued in which to bring a civil suit, while the Lawyer's Committee informed her that the time for court action expired 30 days after the final decision. Upon receiving this information, appellant wrote to the BAR, asking why she was not advised of her right to sue. On July 5, 1973, the CSC wrote back to her, stating that under its interpretation the Equal Employment Opportunity Act of 1972 (which included 42 U.S.C. § 2000e-16) was not retroactive and that, therefore, she had no right to notification.[5]

Appellant went on to request reconsideration of the final agency decision.[6] Reasoning that she had not established a proper basis on which to reopen the prior decision, the BAR rejected the request on November 7, 1973.

The 1973 Complaint

Another teaching position in the Arabic Department at DLI opened up in early 1973. Again, appellant applied for the position and was not selected. As a result, a second complaint, alleging discrimination based on sex and national origin, was filed on July 27, 1973.

On August 6, 1973, the EEO officer for DLI rejected the complaint, in accordance with 5 C.F.R. § 713.215[7/] for the reason that it set forth identical matters contained in the previous complaint. This decision was appealed, and on November 19, 1973, the BAR affirmed.

This time appellant was given her "Right-to-Sue" letter. In this letter of final action the BAR stated:

> "Civil Service Commission Regulations provide that the Board's decision is final and that there is no further right of administrative appeal. However, if the complainant is not satisfied with the decision, she is authorized by section 717(c) of the Civil Rights Act of 1964 as amended on March 24, 1972 to file a civil action in an appropriate U. S. District Court within thirty (30) calendar days of her receipt of this decision." (Exhibit 1, p.4)

Mahroom received notice of this final action on November 21, 1973. Within the requisite thirty days, she instituted this action in the

district court, filing her complaint on December 20, 1973. On April 24, 1975, the appellees moved to dismiss or, alternatively, for summary judgment. As she substituted counsel on May 29, 1975, the scheduled hearing on the motion was postponed. On June 23, 1975, she filed a memorandum in opposition to appellees' motion and a motion for leave to amend the complaint by adding a cause of action based on the 1971 administrative complaint.

On August 1, 1975, both motions were heard. The motion to amend was denied, and the motion for summary judgment was granted. It is from these decisions that this appeal follows.

I. The Motion for Leave to Amend

As discussed above, when the Civil Service Commission's Board of Appeals and Review finally denied Mahroom's claim of discrimination, they did not provide her with her statutory notice of right to sue or what is commonly referred to as the "Right-to-Sue" letter.

Mahroom's claim began in 1971. The effective date of the Equal Employment Opportunity Act [42 U.S.C. § 2000e, et seq.] is March 24, 1972. Her claim was therefore pending administratively on the effective date of the Act.

Because the Commission interpreted the Act as not retroactive to her 1971 claim, they held that she had no right to notification of her right to bring suit in federal court.

Our first inquiry is to decide whether the Equal Employment Opportunity Act is retroactive to cases which are pending administratively at the time of the effective date of the Act. Or, in other words, was Mahroom entitled to notice of her right to sue once the administrative agency's decision to deny her complaint was final?

In Koger v. Ball, 497 F. 2d 702 (4th Cir. 1974), that court held:

> "We conclude that Congress, being fully aware of the general rule favoring retrospective application of procedural statutes, intended by enacting § 717 (c) [42 U.S.C. § 2000e-16 (c)] to grant employees consent to sue for redress of pending cases of pre-Act discrimination." (497 F. 2d at 709-709)

And, in Womack v. Lynn, 504 F. 2d 267 (D.C. Cir. 1974) (which adopted the reasoning of the Koger opinion, supra), the court held:

> "Section 717(c) is merely a procedural statute that affects the remedies available to federal employees suffering from employment discrimination. Their right to be free of such discrimination has been assured for years.

> We hold that this remedial statute applies retroactively to proceedings already pending at the time of its effective date, March 4, 1972." (504 F. 2d at 269) (emphasis in original).

Womack was followed in Grubbs v. Butz, 514 F. 2d 1323 (D.C. Cir. 1975). Other cases which follow this reasoning are: Weahkee v. Powell, 532 F. 2d 727 (10th Cir. 1976); Huntley v. Dept. of H.E.W., 550 F. 2d 290 (5th Cir. 1977); Eastland v. Tennessee Valley Authority, 553 F. 2d 364, 369 (5th Cir. 1977); and Brown v. General Services Administration, 507 F. 2d 1300 (2nd Cir. 1974), aff'd. 425 U.S. 820, 824 n. 4 (The Supreme Court observing that it had "no occasion to disturb" the Second Circuit's decision on retroactivity). See also Bunch v. United States, 548 F. 2d 336 (9th Cir. 1977) and Davis v. Valley Dist. Co., 522 F. 2d 827 (9th Cir. 1975), cert. den., 429 U.S. 1090 (1977).

Following this line of authority we hold that the Equal Employment Opportunity Act is retroactive to embrace claims administratively pending on its effective date and is therefore applicable to Mahroom's 1971 action. Under the Act, 42 U.S.C. § 2000e-12 gives the Commission the authority to issue suitable procedural regulations to carry out the provisions of the Act. In exercise of this authority, the Commission promulgated, among others, 5 C.F.R. § 713.234 and § 713.282.

5 C.F.R. § 713.234, at the time in question,[8/] provided in pertinent part:

> "The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. . . . The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof to the complainant, his designated representative, and the agency. . . . The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with § 713.282." (emphasis added)

5 C.F.R. § 713.282 in pertinent part provides:

> "The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under § 713.234."

The thirty-day time limit referred to in these regulations is set out by Congress in section 717(c) of the Act [42 U.S.C. § 2000e-16(c)] which provides that "[w]ithin thirty days of receipt of notice of final action. . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint,

. . . may file a civil action as provided in section 706" [42 U.S.C. § 2000e-5].

Therefore, under this statute, as interprted by the agency designated to interpret and enforce it, notice must be given to the employee or applicant that he has the right to bring an action in federal court and that he has thirty days in which to act.

This thirty-day time period is jurisdictional. If an aggrieved party does not file his suit within that time limit, the federal courts have no power to entertain the suit. Cleveland v. Douglas Aircraft Co., 509 F. 2d 1027, 1029 (9th Cir. 1975), Wong v. Bon Marche, 508 F. 2d 1249 (9th Cir. 1975). See also Brown v. General Services Administration, 425 U.S. 820 (1976).

The question which arises once it has been determined that notice is required is when does the thirty-day period begin to run. In Gates v. Georgia-Pacific Corporation, 492 F. 2d 292, 295 (9th Cir. 1974), we held that "the 30 day period within which the civil action may be brought commenced when the January 23, 1969, formal notice was received." (emphasis added) We limited Gates to its facts and left open the specific question of what form of notice would trigger the thirty-day period in other circumstances.

The appellee contends that the thirty-day period began to run as soon as Mahroom received notice of the BAR's final decision, regardless of whether or not she received any "Right-to-Sue"

letter. We disagree and hold that the thirty-day time limit does not begin to run until the aggrieved party has received actual formal notification of his statutory right to sue in federal court. By this we mean receipt of the so-called "Right-to-Sue" letter.

In holding this way, we follow such authority as Coles v. Penny, 531 F. 2d 609 (4th Cir. 1976), where the Fourth Circuit held that:

> ". . . the thirty-day period within which a civil action may be filed did not begin to run until July 18, 1973 - - the first time at which appellant was notified [by way of a "Right-to-Sue" letter] that he had a right to bring a civil action within thirty days." (531 F. 2d at 617)

And, in Garner v. E. I. DuPont DeNemours & Co., 538 F. 2d 611 (4th Cir. 1976), that court also stated:

> "In conclusion, we hold that, for reasons substantially similar to those given by Judge McGowan in Coles, it was within the regulatory power of the EEOC in interpreting § 706 (f) (1) of Title VII to treat only a formal "right to sue" letter from the EEOC as

> constituting the requisite statutory 'notice' which started the permissible period for initiating a federal court case under Title VII." (538 F. 2d at 615)

Other cases which support this result are: Lacy v. Chrysler Corp., 533 F. 2d 353, en banc, (8th Cir. 1976), cert. den., 429 U.S. 959; Tuft v. McDonnel Douglas, 517 F. 2d 1301 (8th Cir. 1975), cert. den., 423 U.S. 1052 (1976); Williams v. Southern U. Gas Co., 529 F. 2d 483 (10th Cir. 1976), cert. den., 429 U.S. 959, and Page v. U. S. Industries, 556 F. 2d 346 (5th Cir. 1977). See also, Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (where the Supreme Court noted that one of the jurisdictional prerequisites to Title VII suits was that the claimant receive and act upon Commissioner's statutory notice of the right to sue).

As we mentioned above, Mahroom did not receive any "Right-to-Sue" letter. What she did receive was a letter from the BAR which denied her claim of employment discrimination and stated that "Civil Service Regulations provide that the decision of the Board is final and that there is no further right of administrative appeal." (Exhibit 1 at 104)

The Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of the victims of discrimination. Davis v. Valley Dist. Co., 522 F. 2d 827, 832 (9th Cir. 1974), EEOC v. Wah Chang Albany Corp., 499 F. 2d 187, 189 (9th Cir. 1974). Accordingly, "courts

confronted with procedural ambiguities in the statutory framework have, with virtual unanimity resolved them in favor of the complaining party." Davis v. Valley Dist. Co., supra, quoting Sanchez v. Standard Brands, Inc., 431 F. 2d 455, 461 (5th Cir. 1970). The broad structure and purpose of Title VII, as established by Congress, relies upon laymen, operating without legal assistance, to initiate both administrative complaints and lawsuits. Congress did not intend that such laymen, not schooled in the finer points of legal procedure, be presumed to know exactly what procedural step they must next take in order to perfect their claims, especially when they have been conclusively told that they have no further rights or remedies. By holding that Mahroom must be specifically informed in the "Right to Sue" letter that she has a right to sue and how much time she has in which to bring the suit, we give effect to the intent and purpose of Congress in enacting Title VII.

In this case, Mahroom was a layman and operated without legal assistance for her 1971 claim. Because the BAR wrote and told her that their decision was final, it is not reasonable or within the policy of Title VII to hold that she should have known that she had only thirty days to institute suit from that time. The reasoning for this was persuasively stated in Coles v. Penny, supra, in a factual situation strikingly similar to the facts of this case. In Coles the court reasoned:

> "Thirty days is not a long period in which to expect a pro se complainant to become aware of and exercise his statutory right to sue. Consider the situation in which the appellant found himself in this case. After two years of administrative consideration, his claim was denied by the Board of Appeals and Review. The notice he received--that 'Civil Service Regulations provide that a decision of the Board is final and that there is no further right to administrative appeal'-- had a definite right of finality to it. A trained lawyer might realize that judicial review commences when administrative appeals end, but we do not believe that such a realization is likely to spring forth full blown in the mind of a layman; the notice actually received may rather have stifled any inclination appellant might have had to pursue the matter any further. It may be more than coincidental that appellant filed a timely action regarding his 1972 complaint, as to which he received notice of his right to sue, whereas his failure to bring an action regarding his 1970 complaint followed a less informative and possibly misleading notice.
> (531 F. 2d at 615)(emphasis in original)

Since Mahroom has never received a "Right to Sue" letter on her 1971 action, our next inquiry is whether her right to bring suit can continue indefinitely until

the "Right-to-Sue" letter is received. More specifically, the question is whether Mahroom should have been able in 1975, to amend her complaint (filed on her 1973 discrimination action) to include her 1971 action. The situation is this. In 1971 she complained of discrimination. Her claim was denied. She was told the decision was final, but was not told she could sue. She did not sue. In 1973 she again complained of discrimination. Her claim was again denied. She was told the decision was final. However, this time she was told that under the statutes she did have a right to sue within thirty days.

Under the facts of this case, we find that the thirty-day time limit to file a federal suit on both her 1971 and 1973 claims began to run when she in fact received the "Right-to-Sue" letter on November 21, 1973, in regard to her 1973 action.

We find that if Mahroom would have brought suit on her 1971 action (or alternatively, amended her 1973 complaint to include her 1971 action), within the thirty days following receipt of her "Right-to-Sue" letter on November 21, 1973, the action would have been timely. This is the precise result that the Fourth Circuit arrived at in Coles v. Penny, supra, under that nearly identical factual situation. In that case, the appellant Melvin Coles had filed a 1970 discrimination claim. It was denied and "finalized" much the same as Mahroom's claim was. He also was given no notice of right to sue. In 1972 he filed another discrimination claim. This claim was also denied, but

he was given the statutory notice of his right to sue. Within thirty days of this "Right-to-Sue" letter he filed a suit on his 1970 claim, as well as a new 1972 claim. The district court found the 1970 claim untimely and granted summary judgment against Coles. The Fourth Circuit reversed and remanded, holding (as quoted, supra) that the thirty-day time limit did not begin to run on the 1970 claim until receipt of the "Right-to-Sue" letter, which involved his later 1972 claim.

Because of our holding that Mahroom's right to sue on the 1971 claim was only timely within thirty days of receipt of the November 21, 1973, "Right-to-Sue" letter, her motion to amend the complaint over one year and seven months later, was untimely. The district court properly denied that motion as it was without jurisdiction at that time to hear the 1971 claim. Cleveland v. Douglas Aircraft, Wong v. Bon Marche, and Brown v. General Services Administration, supra.

II. The Motion for Summary Judgment

Under Chandler v. Roudebush, 425 U.S. 840 (1976), applicants for federal employment bringing suit under 42 U.S.C. §2000e-16(c) have the same right to a trial de novo as is enjoyed by applicants for employment in the private sector under 42 U.S.C. §2000e-5.

In their memorandum for support of the motion for summary judgment, appellees contended that no trial de novo was required for suits brought under §2000e-16. This position, of course, was

directly rejected in Chandler. However, Chandler does not require a de novo hearing in every instance; if a complaint brought under 42 U.S.C. §2000e-5 would be properly disposed of by summary judgment, then it is appropriate for a district court to handle similarly a complaint brought under 42 U.S.C. §2000e-16.

Summary judgment is appropriate only when the movant has proven that there is no genuine issue of material fact. See Federal Rule of Civil Procedure 56(c). Since the motion for leave to amend was properly denied, the only controversy before the district court concerned the 1973 discrimination action. The 1973 action is allegedly barred under 5 C.F.R. §713.215 for setting forth "identical allegations" as in the 1971 action. It is true that the 1971 and 1973 complaints do set forth the same claims of discrimination, i.e., discrimination on the basis of sex and her Iraqi national origin. Appellees countered these claims by responding each time that priority was given to applicants proficient in the Arabic-Egyptian dialect and that Mahroom was not the victim of any discrimination.

While the complaints do state similar actions, we feel that the 1973 complaint did state a cause of action new and separate from the 1971 complaint because in 1973 she was competing against a different set of applicants with potentially different qualifications than she competed against in 1971. Other facts may also be different. Her not being selected from the 1973 applicants has not yet been considered in the administrative process. We feel that it is totally

inappropriate to forever bar an applicant for federal employment from either administrative or judicial consideration of a discrimination charge simply because that individual had claimed similar acts of discrimination at an earlier time and had not prevailed. Mahroom's 1973 action was not "identical" to her 1971 action. We do not believe that 5 C.F.R. §713.215 was intended to prevent the hearing of discrimination complaints on new causes of action.

Therefore, the stated grounds for dismissal of her complaint by the CSC were erroneous. The district court, in turn, was in error when it granted summary judgment. The factual allegations raised by appellant had never been heard and such a hearing is required by Chandler v. Roudebush, supra.

Therefore, we reverse and remand for a trial de novo in accordance with the Supreme Court's decision in Chandler. We, of course, do not preclude further summary judgment motions, if appropriate. We express no opinion regarding the merits of Mahroom's allegations.

The reply brief of appellant has not been considered. No good cause has been shown for the late filing and the motion to strike the reply brief is GRANTED.

AFFIRMED IN PART. REVERSED AND REMANDED IN PART.

FOOTNOTES

1/ Appellant also brought suit under 28 U.S.C. §1343. However, the Supreme Court has made clear that 42 U.S.C. §2000e-16 provides the exclusive judicial remedy for claims of discrimination in federal employment. Brown v. GSA, 425 U.S. 820 (1976). See also, Eastland v. Tennessee Valley Authority, 553 F. 2d 364, 371 (5th Cir. 1977).

2/ The Arabic language contains numerous different dialects. In each Arabic language class at DLI, a specialization in one of these dialects is taught. Appellant is trained solely in the Arabic-Iraqi dialect; however, preference in the selection process was to go to those trained in the Arabid-Egyptian dialect. The stated reasons for this preference were simply that there were more students interested in that dialect and that there was a sufficient supply of instructors trained in the Iraqi dialect to handle the demand.

3/ A "Right-to-Sue" letter informs an employee or applicant of his right to file a civil action and of the 30-day time limit for filing.

4/ It should be noted that appellant was not represented by counsel during the course of this first administrative appeal.

5/ In its letter to appellant the BAR stated:

> "It is our interpretation that notification of the right to file a civil action under the provisions of the Equal Employment Opportunity Act of 1972 arises only when the alleged act or acts of discrimination occurred on or after March 24, 1972, the date the Act became effective. Because your complaint was filed on October 28, 1971 notice of a right to file a civil action was not included in the Board's decision in your case." (Exhibit 1 at 87)

6/ Letters to this effect were sent to the BAR on July 25, 1973, October 19, 1973, and October 30, 1973.

7/ 5 C.F.R. 713.215 provides, in part:

> "The head of an agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of §713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency." (emphasis added)

8/ 5 C.F.R. §713.234 was amended slightly on September 9, 1974, and

changed the name of the Board of Appeals and Review to the Appeals Review Board. In other respects the regulation is identical to the 1972 version.

EXHIBIT "B"

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42 USC §2000e-16(c) provides:

"(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

5 C.F.R. §713.215

"The head of the agency or his designee may reject a complaint which was not timely filed and shall reject those allegations in a complaint which are not within the purview of §713.212 or which set forth identical matters as contained in a previous complaint filed by the same complainant which is pending in the agency or has been decided by the agency. He may cancel a complaint because of failure of the complainant to prosecute the complaint. He shall transmit the decision to reject or cancel by letter to the complainant and his representative. The decision letter shall inform the complainant of his right to appeal the decision of the agency to the Commission and of the time limit within which the appeal may be submitted and of his right to file a civil action as described in §713.281."

5 C.F.R. §713.234

"The Board of Appeals and Review shall review the complaint file and all relevant written representations made to the board. The board may remand a complaint to the agency for further investigation or a rehearing if it considers that action necessary or have additional investigation conducted by Commission personnel. This subpart applies to any further investigation or rehearing resulting from a remand from the board. There is no right to a hearing before the board.

The board shall issue a written decision setting forth its reasons for the decision and shall send copies thereof to the complainant, his designated representative, and the agency. When corrective action is ordered, the agency shall report promptly to the board that the corrective action has been taken. The decision of the board is final, but shall contain a notice of the right to file a civil action in accordance with §713.282."

5 C.F.R. §713.282

"An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any final action on a complaint under §§713.215, 713.217, 713.220, or §713.221. The Commission shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in any decision under §713.234."

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 1978, three copies each of the Petition for Writ of Certiorari were air-mailed, postage prepaid, to the following:

Solicitor General
Room 5614
Dept. of Justice
Washington, D.C. 20530

Secretary of the Army
General Counsel
Department of Army, 2nd Headquarters
Pentagon
Washington, D.C. 20301

Susan Davis Wallace

SUSAN DAVIS WALLACE

No. 77-1240

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADIBA MAHROOM, PETITIONER

v.

COLONEL JOHN HOOK, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. In 1971, petitioner filed an administrative complaint charging the Department of the Army with employment discrimination. She alleged that she had been denied a teaching position at the Defense Language Institute because of her sex and her national origin. The Army's Civilian Appellate Review Office and the Civil Service Commission's Board of Appeals and Review both ruled that the allegations of discrimination were unfounded (Pet. App. 18-20). Petitioner was notified of the adverse decision. She was not told that she had a right to sue in district court on the claim, however, because it was the position of the Civil Service Commission that allegations of discrimination by the federal government occurring

prior to March 24, 1972, could not be the subject of a court action[1] (Pet. App. 20, 36).

In 1973, petitioner filed a second administrative claim, again alleging that she was denied a teaching position on the basis of her sex and national origin (Pet. App. 20). The complaint was rejected on the ground that it set forth matters identical to those raised in her original complaint. This time petitioner was notified of her right to sue within 30 days (Pet. App. 20-21).

Petitioner brought a timely action in the United States District Court for the Northern District of California. Her complaint, however, raised only the issues presented in the second administrative claim (Pet. App. 21-22). Eighteen months later, after respondents had filed a motion to dismiss and an alternative motion for summary judgment, petitioner moved to amend her complaint to add a cause of action based on the first administrative claim (Pet. App. 22). The district court denied the motion to amend and granted summary judgment for respondents.

On appeal, the court of appeals affirmed the denial of the motion to amend but reversed the award of summary judgment and remanded the case to the district court for further proceedings. The court of appeals held that federal employees could bring suit under Title VII for discrimination occurring before March 24, 1972 (Pet. App. 23-24), and it held that the notice of final administrative action with respect to petitioner's first claim did not start the

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[1]March 24, 1972, was the effective date of Section 717 of the Civil Rights Act of 1964, as added, 86 Stat. 111, 42 U.S.C. (Supp. V) 2000e-16, which provides a right to sue for alleged discrimination by the federal government.

running of the statutory 30-day period within which to file suit, because she had not explicitly been advised at that time of her right to sue (Pet. App. 25-30). The court found, however, that the 30-day period for her 1971 claim began to run when she was notified of her right to sue after the conclusion of the second administrative proceeding (Pet. App. 30-32). Since the motion to amend her complaint was not made until 19 months after petitioner was notified of her right to sue, the court of appeals held that the district court properly denied the motion to amend and declined to adjudicate the matters raised in her 1971 claim (Pet. App. 32).

2. The statutory provision governing civil actions in federal employee discrimination cases requires that suit be filed "[w]ithin thirty days of receipt of notice of final action." 42 U.S.C. (Supp. V) 2000e-16(c). Petitioner correctly notes that the courts of appeals disagree on the issue of whether the statutory "notice of final action" must contain notice of a right to sue.[2] That issue, however, is not presented in this case, since the court of appeals agreed with petitioner that notice of a right to sue is required. Instead, the court of appeals ruled against petitioner on the different—and unexceptionable—ground that the notice of a right to sue on her first claim was effectively provided when petitioner was notified of her right to sue on her second claim, and that the 30-day period began to run at that time on both claims. This holding is entirely consistent with *Coles* v. *Penny*, 531 F. 2d 609, 614 (C.A.D.C.), the nearest applicable precedent, and petitioner cites no authority to the contrary.

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[2]Compare *Eastland* v. *Tennessee Valley Authority*, 553 F. 2d 364 (C.A. 5), with *Coles* v. *Penny*, 531 F. 2d 609 (C.A.D.C.), and *Allen* v. *United States*, 542 F. 2d 176 (C.A. 3).

Making the same contention under a different banner, petitioner next argues (Pet. 11-14) that she should have been permitted to amend her complaint under the doctrine of equitable estoppel. Yet for the same reasons that the court of appeals held that the notice of her right to sue on her second claim was sufficient to start the time running on her first claim (Pet. App. 30-32), petitioner cannot rely on the allegedly erroneous interpretation of law by the Civil Service Commission at the time her first claim was denied to toll indefinitely the limitations period applicable to that claim. When she filed her complaint on the second claim within 30 days of the final administrative action on that claim, she had received a "right to sue" letter and had obtained counsel. Yet she waited another 18 months before seeking to raise the issues decided against her in the first administrative proceeding more than two years before.[3] The motion to amend was properly denied.

In any event, the present petition is premature. The court of appeals did not enter a final order in this case but remanded the case for further proceedings on petitioner's claim of discrimination. The result of those proceedings could, of course, render it unnecessary for this Court to

[3]*Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, on which petitioner relies, is inapposite. In that case the Court held that the Federal Employers' Liability Act statute of limitations would not be applied where the defendant had represented to the plaintiff that the applicable limitations period was seven years, rather than three, and the plaintiff was induced to delay suing until after the three-year statutory period had run. Here, by contrast, petitioner seeks to toll the statutory period for suit on the basis of the Commission's legal opinion on a question as to which she was in possession of all the relevant facts. See *Sturm* v. *Boker*, 150 U.S. 312. If the doctrine of equitable estoppel were applied in a case such as this one, the government would effectively waive forever the protection of a statute of limitations merely by stating its view that particular governmental conduct was not actionable.

resolve any of the questions presented here. Or, if the dispute is still unresolved at the conclusion of the proceedings on remand, all claims arising out of the case can be presented to the Court at the same time. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258; *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 378, 384.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.